UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AMERICAN MUNICIPAL POWER, INC.	:	
	:	
Employer,	:	
	:	
and,	:	
	:	Case No. 10-RC-213684
INTERNATIONAL BROTHERHOOD	:	
OF ELECTRICAL WORKERS, AFL-CIO,	:	
LOCAL UNION NO. 816,	:	
	:	
Petitioner.	:	

Petitioner's Response in Opposition to Employer's
Request for Review of Regional Director's Decision and Direction of Election

A. Introduction

Now comes the Petitioner, International Brotherhood of Electrical Workers, AFL-CIO, Local Union No. 816, and files this response opposing the request by American Municipal Power, Inc. ("Employer") to review the Regional Director's Decision and Direction of Election in this matter. The Employer has not established the standard grounds necessary to permit review of the Regional Director's decision. After a full-hearing, at which time all parties had the opportunity to present evidence on the issues raised by the petition, to examine and cross-examine witnesses, and present arguments and case law in support of their positions, the Regional Director found the following unit appropriate:

> All full-time and regular part-time Operator 1 and Operator II employees employed by American Municipal Power, Inc. at its facility located at 1297 Smithland Dam Road, Smithland, Kentucky, excluding office clerical employees, profession employees, confidential employees, guard, and supervisors as defined in the act.

To succeed with its request, the Employer must show there is a compelling reason for review of the Regional Director's decision. A request for review may only be granted if the compelling reason is based upon the following grounds:

(1) That a substantial question of law or policy is raised because of:

(i) The absence of; or

(ii) A departure from, officially reported Board precedent.

(2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

(3) That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

(4) That there are compelling reasons for reconsideration of an important Board rule or policy. (29 C.F.R. § 102.67)

The Employer failed to craft a compelling argument that met the high standards of any of the grounds necessary for review of a Regional Director's decision. The Employer has not raised an argument claiming the conduct of the hearing or ruling resulted in prejudicial error, nor has the Employer discussed any compelling reasons for reconsideration of an important Board rule or policy. Instead, the Employer has argued that the Regional Director made erroneous conclusions of fact and law in determining an appropriate bargaining unit. Petitioner contends that no such errors were made. Additionally, the Employer cannot demonstrate that any alleged errors were so egregious as to rise to the level of compelling or creating a substantial issue necessary for resolution before the Board. As such, the following analysis will be focused on the

Employer's failure to develop the necessary compelling argument needed to meet the first two grounds for review.

B. Analysis

1. Employer fails to Raise a Substantial Question of Law or Policy the Regional Director Allegedly Departed from Established Board Precedent.

The questions of law or policy raised by the Employer focus on whether the unit definition is appropriate. An appropriate unit is a group of two or more employees who share a community of interest and can be grouped together to collectively bargain. Section 9(b) gives the power to the Board to determine whether a unit is appropriate to assure employees the fullest freedom in exercising their rights guaranteed by the subchapter. 29 U.S.C.A. § 159. The bargaining unit need not be the single best unit, it simply must be appropriate. FedEx Freight, Inc. v. N.L.R.B, 816 F.3d 515, 523 (8th Cir. 2016). Further,

> "…the Board seeks to fulfill the objectives of ensuring employee self-determination, promoting freedom of choice in collective bargaining, and advancing industrial peace and stability. Under the Act, our task is to determine not the most appropriate or comprehensive unit, but simply an appropriate unit. In doing so, we look first to the unit sought by the petitioner. If it is appropriate, our inquiry ends. If, however, it is inappropriate, the Board will scrutinize the employer's proposals."
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> Dezcon, Inc., 295 NLRB 109, 111 (1989).

Because the Employer's request fails to demonstrate that the unit definition is inappropriate, no further review should be sought.

First, the Employer does not dispute (and thus concedes) that the essential portion of the unit definition, "all-full time and regular part-time Operator I and Operator II employees employed by American Municipal Power, Inc. at its facility located at 1297 Smithland Dam Rd…" represents the proper community of interest for the eight (8)

employees who actually meet this definition at that facility. Instead, the Employer attempts to argue that this otherwise clear language seemingly includes employees who may be temporarily-assigned to the facility at some future (but undisclosed and uncertain) date, which the Employer believes do not fall under the community of interests of the existing unit of eight workers. This argument rings hollow given the plain language of the unit as defined.

The above definition clearly designates the employees in question as those full-time and regular part time Operators at the Employer's particular facility (Smithland). The unit description must have a reasonable reading and be read holistically: "**All-full time and regular part-time** Operator I and Operator II employees **employed** by American Municipal Power, Inc. **at** its facility located at…". The unit definition is appropriate and is clearly defined to represent the eight Operators who voted for unionization. A full-time or part-time employee at another Employer facility who visits or is on temporary assignment at the Smithland facility would not meet the clear language of the unit definition. If an employee is sent on an assignment long enough to be part time or full time at the facility, then the individual may have the same community of interests and be included in the bargaining. The Regional Director's decision specifically contemplates that this may occur, and held that there was ample precedent for resolving that individual employee's status through bargaining. The Employer encourages the Board to read the unit description piecemeal, but when given its plain and natural meaning, it clearly does not automatically add all temporarily assigned employees to the facility. Therefore, the Employers interpretation is not reasonable, and

certainly does not meet the threshold of a compelling reason to change the unit definition and hold a new election.[1]

Second, because the unit description is appropriate, it is therefore unnecessary for the decision to include the language "all other employees." The unit definition clearly states which employees fall under the unit definition. Petitioner agreed with the inclusion because it is already inherently in the current definition. Adding this to the definition and causing another election would be superfluous and far from the compelling reasons needed for review.

The Regional Director's application of the Board law demonstrates why the above interpretation of the unit definition is appropriate. The Employer's request failed to accurately repudiate or differentiate the principles the Regional Director's cited in the Decision and Direction of Election. In Coca-Cola Bottling Co. of Wisconsin, 310 NLRB 844 (1993), the Employer claimed its recent temporary assignments of Operators to Smithland and its lack of recognition clauses made it distinguishable from the case. It is true that *Coca-Cola Bottling Company* had no recent employees and it did have recognition clauses, but this distinction does not address the core principle cited by the Regional Director. "In representation cases in general and unit clarification proceedings in particular, the Board looks to the actual, existing composition of units and to

[1] Joe Frakes, an Operator from Cannelton, who worked at Smithland on a temporary basis, would not be covered under the unit definition because he was not employed at the Smithland facility when the vote commenced. Further, no evidence has been presented Frakes would spend future time at the facility, let alone enough time to constitute regular part-time or full time. Under these circumstances, he would not meet the community of interest standard.

employees actually working to determine the composition of units, not to abstract grants of recognition." Coca-Cola Bottling Co. of Wisconsin, 310 NLRB 844 (1993).

The Employer's clarification of the ITT World Commc'ns, 201 NLRB 1 (1973) decision claims the Regional Director is mistaken, but again, misses the point. The Regional Director asserted the petition was dismissed because there were not actual employees within the classification. The Employer's clarification that the dismissal in ITT was based upon the employees being statutory supervisors does not make the Regional Director's decision mistaken. Statutory supervisors are not considered employees under the Act, therefore the Regional Director's assertion is still accurate.

In Union Electric, 217 NLRB 666 (1975), the Employer attempts to claim inapplicability because the case dealt with a contractual and established exclusion. This again misses the principles behind the decision. Union Electric relies upon the premise that employees who may later join the existing unit or be assigned what is arguably bargaining unit work in the future need not be specifically identified in the initial unit definition. The employees can be defined through the collective bargaining process instead of readdressing the unit definition. This principle is just as relevant to the unit definition stage as it is to the contractual and established exclusion phase.

Finally, although the Employer claims the unit placement and voting eligibility are inseparable issues, it fails to show how the Regional Director has departed from existing Board precedent on this issue or why an absence of the discussion of this issue is relevant, let alone substantial, regarding the unit definition. If one were to assume that unit placement and voting eligibility are inseparable issues, the legal conclusions would not apply in this situation. The Employer and Petitioner agreed the eight members

should vote and that the past temporary workers should not vote upon the unit definition. Only current members under the unit description are eligible to vote, not the highly speculative future workers that Employer prophesizes may eventually join the fold. The eight current members were the only members eligible to vote at the time of the petition, and they all voted to unionize. Further, the Employer has not, and is not capable of, providing a list of employees who may be temporarily assigned to Smithland for a regular part-time or full-time assignment at Smithland. This is because the Employer has no specific future assignments for temporarily assigned employees. The hypothetical future temporary employees who may fit under the unit description are just as speculative as potential future hires, and thus unable to vote. Under these circumstances, no compelling reason exists as to why unit placement and voting eligibility should lead to a potential review of the unit definition and direction of election.

2. Employer fails to substantiate its claim that the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and that such error prejudicially affects the rights of a party.

The Employer can point to a single factual determination by the Regional Director which it alleges is erroneous: that the Employer has no current plans to assign Operators to work at the Smithland facility in the future. However, while the Employer claims the Director's reliance on this fact was misplaced, it does not claim the fact itself is false. The Employer is unable to claim this fact is erroneous as the record is clear there were no temporary assigned employees working at the time of the vote and there were no current plans for temporary assigned employees for the future. Nor has the Employer given any concrete evidence demonstrating that temporary employees will be needed in the future, and that they may stay at Smithland for a substantial period of

time. Even if the Employer had produced such evidence, which it did not, it would not alter the fact that the unit definition is clear that any such employee who is hired to work on a full-time or part-time basis at the Smithland facility would be considered a part of the bargaining unit. The theoretical future temporary employee is, by definition, not included in the unit.

C. Conclusion

The Employer has failed to show a compelling reason under any of the grounds detailed in 29 C.F.R. § 102.67 for the granting of a request for review of the Regional Director's decision. The Employer agreed that the eight employees who voted unanimously to elect Petitioner as their bargaining representative fit the plain language of the unit definition that was approved. Completely absent from Employer's request for review are any compelling reasons, for the Board to revisit the definition and order a new election. Instead, the Employer either encourages a reading of the unit definition which is improperly piecemeal, or provides rank speculation that lacks any evidentiary basis. As such, the Employer has failed to present a compelling reason under the approved grounds for a review of the Regional Director's decision and direction of the election and should be denied.

DATED: March 27, 2018

Respectfully Submitted,

/s/ Joe P. Leniski, Jr.

Joe P. Leniski, Jr., BPR #22891
BRANSTETTER, STRANCH & JENNINGS, PLLC
The Freedom Center
223 Rosa L. Parks Ave., Suite 200
Nashville, Tennessee 37203
Tel: (615) 254-8801
E-mail: joeyl@bsjfirm.com

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing was electronically filed with the National Labor Relations Board and served by e-mail on March 27, 2018 upon the following:

John D. Doyle, Jr. Regional Director
National Labor Relations Board
Region 10
john_doyle@nlrb.gov

Kerry P. Hastings
Taft Stettinius & Hollister LLP
425 Walnut Street, Suite 1800
Cincinnati, OH 45202-3957
Tel: (513) 381-2838
Fax: (513) 381-0205
hastings@taftlaw.com

Pursuant to 29 C.F.R. § 102.67(i), a true and accurate copy of the foregoing has also been electronically filed with the Regional Director on March 27, 2018.

/s/ Joe P. Leniski, Jr.
Joe P. Leniski, Jr.